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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 884

LYLE E. REILEY, GEORGE A. FREIBERT, FRED J. BAUER, ET AL.,

Petitioners,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Opinions below	2
Jurisdiction	2
Statutes involved	3
Statement of facts and matters involved in this petition	3
Questions presented	10
Reasons for granting the writ	12
Prayer for writ	13
Brief in support of petition	15
Opinion of the court below	15
Jurisdiction (See petition)	16
Statement of the case (See petition)	16
Specification of errors	16
Argument	16
Conclusion	42

Table of Cases Cited

Allis-Chalmers Mfg. Co., 11 War Lab. Rep. 518	29
Aluminum Co. of America, 12 War Lab. Rep. 455	29
American Federation of Labor v. *Madden*, 33 F. Supp. 943	13
American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401	13,28,32,33
Anniston Mfg. Co. v. *Davis*, 301 U. S. 337	22
Automatic Transportation Co., 8 War Lab. Rep. 1	29
Chicago Junction Case, 264 U. S. 258	9,10,17
Coppage v. *Kansas*, 236 U. S. 1	30
Crowell v. *Benson*, 285 U. S. 22	35,36
Employers Group, etc. v. *National War Labor Board*, 143 F. (2d) 145	41
Inland Empire District Council etc. v. *Graham*, 53 F. Supp. 369	13

Page

International Brotherhood of Electrical Workers v. *N. L. R. B.*, 41 F. Supp. 57 13
Klein v. *Herrick*, 41 F. Supp. 417 13
Labor Board v. *Jones & Laughlin*, 301 U. S. 1 21
Lebanon Steel Co., 2 War Lab. Rep. 283 29
Louis. & Nash. R. R. Co. v. *Finn*, 235 U. S. 601 26
Myers v. *Bethlehem Corp.*, 303 U. S. 41 34
National Labor Relations Board v. *Bank of America etc.*, 130 F. (2d) 624 22
National Labor Relations Board v. *Santa Cruz Fruit P. Co.*, 91 F. (2d) 790 23
Ohio Valley Co. v. *Ben Avon Borough*, 253 U. S. 287 39
Prendergast v. *N. Y. Tel. Co.*, 262 U. S. 43 39
R. R. Comm'n v. *Pacific Gas Co.*, 302 U. S. 388 27
Rochester Tel. Corp. v. *United States*, 307 U. S. 125 29
Santa Cruz Co. v. *Labor Board*, 303 U. S. 453 20,23
Shields v. *Utah Idaho R. Co.*, 305 U. S. 177 29,35
Stark v. *Wickard*, 321 U. S. 288 35
Switchmen's Union v. *Board*, 320 U. S. 297 40
Texas & N. O. R. Co. v. *Ry. Clerks*, 281 U. S. 548 30
Warren-Bradshaw Co. v. *Hall*, 317 U. S. 88 20
Utah Fuel Co. v. *Coal Comm'n.*, 306 U. S. 56 35
Utah Power & Light Co. v. *Pfost*, 286 U. S. 165 22

Statutes Cited

Constitution of the United States:
Article I, Sec. 8, Clause 3 18
Article III, Sec. 2 3,32
Fifth Amendment 4

Judicial Code:
Sec. 24(1), 28 U. S. C. A. 41(1) 3
Sec. 24(8), 28 U. S. C. A. 41(8) 3
Sec. 240(a), 28 U. S. C. A. 347(a) 3

National Labor Relations Act:
29 U. S. C. A. 151 et seq. 3
29 U. S. C. A. secs. 152(6) 3
29 U. S. C. A. secs. 152(7) 3
29 U. S. C. A. secs. 159(c) 3

Page
Sec. 2(6) 19
Sec. 2(7) 19
Sec. 9(c) 19

TEXTS CITED

Vom Baur "Federal Administrative Law":
Vol. 1, p. 256 36
Vol. 2, p. 703 18

SUPREME COURT OF THE UNITED STATES

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No. 884

LYLE E. REILLY, GEORGE A. FREIBERT, FRED J. BAUER, ARTHUR H. MEYER, EMIL DUNGER, THOMAS J. GEARY, FINGAL GUSTAFSON, HUGHES F. MEIGHEN, HARRY J. SCHULTE, JERRELL D. BROWN, ALFRED WILLIAM SEHLKE, FRANK ROSS, JOSEPH HAVEL, ERNEST E. JOHNSON, FRANK A. BARR, JAMES DINLEY, W. H. KRAUSE, CLARENCE A. CORNELIUS, NORMAN D. RENN, JOHN J. BOMICINA,

Petitioners,

vs.

HARRY A. MILLIS, INDIVIDUALLY AND AS CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD; GERARD D. REILLY, INDIVIDUALLY AND AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD; JOHN M. HOUSTON, INDIVIDUALLY AND AS A MEMBER OF THE NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Justices of the Supreme Court of the United States:

The above named petitioners respectfully petition for a Writ of Certiorari to review judgment of the United States

Court of Appeals for the District of Columbia, rendered on July 10, 1944 (R. 45). Said judgment affirmed an order of the United States District Court for the District of Columbia denying petitioners' motion for a preliminary injunction and dismissing petitioners' complaint (R. 41). The case came before the Court of Appeals on petitioners' appeal from said order of the District Court (R. 42).

Opinions Below

The District Court for the District of Columbia, Honorable Edward C. Eicher, Chief Justice, held that it had jurisdiction of petitioners' complaint in which they asked for a mandatory injunction to set aside and expunge from the records of the National Labor Relations Board a direction of election and certification of a collective bargaining representative for a group of employees which included petitioners. The court dismissed the complaint upon the ground that the complaint did not show that the National Labor Relations Board had acted arbitrarily and capriciously or beyond its jurisdiction.

The District Court's opinion is reported in 52 F. Supp. 172. It is also set forth in the record at pages 39-40.

The Court of Appeals affirmed the judgment of the District Court upon the ground that petitioners had made no showing of any special circumstances which made the review provided by the National Labor Relations Act an inadequate remedy for the matters set out in the complaint.

The opinion of the Court of Appeals is reported in 144 F. 2d 259. It is also set forth in the record at page 44.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia was entered July 10, 1944 (R. 45). A petition for rehearing duly filed by the petitioners was denied on

September 23, 1944 (R. 46). On December 2, 1944, Chief Justice Stone of this Court signed an order extending until February 1, 1945, the time within which your petitioners might file this, their petition for certiorari.

Petitioners base their action upon the original jurisdiction conferred upon federal courts of controversies arising under the Constitution and laws of the United States (Judicial Code, 24 (1); 28 U. S. C. A. 41 (1)), over "all suits and proceedings arising under under any law regulating commerce" (Judicial Code, 24 (8); 28 U. S. C. A. Section 41 (8)), and upon the jurisdiction with which courts of the United States are vested under Article III, Section 2 of the Constitution.

The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code (28 U. S. C. A. Section 347 (a)), and Supreme Court Rule 38, Pars. 5 (b) and 5 (c).

Statutes Involved

The statute involved is the National Labor Relations Act, 29 U. S. C. A. 151, *et seq.*, especially 29 U. S. C. A. Secs. 152 (6), 152 (7) and 159 (c).

The pertinent provisions of these sections are short and are quoted in full at the appropriate place in the brief filed in support of this petition.

Statement of Facts and Matters Involved in This Petition

This is a suit instituted by the petitioners for equitable relief by way of a mandatory injunction from acts of the National Labor Relations Board alleged to be arbitrary and capricious, unsupported by the evidence, contrary to the evidence and beyond the power and jurisdiction of the Board and in plain contravention of the National Labor Relations Act (hereinafter sometimes referred to as the

"Act") and of the Constitution of the United States and particularly the Fifth Amendment thereto.

The complaint, filed by petitioners and naming the Chairman and the members of the National Labor Relations Board individually and in their official capacities, as defendants, alleges the following facts:

Plaintiffs (petitioners), twenty in number, are employed by the City National Bank and Trust Company of Chicago (hereinafter called the "Bank") as a part of its protective force. The Bank is a national banking corporation, chartered under the National Banking Act, and engages in general banking activities (R. 3).

The City National Safe Deposit Company (hereinafter called the "Safe Deposit Company") is an Illinois corporation engaged in the business of renting deposit space to the public, is a wholly-owned subsidiary and paying tenant of the Bank, and occupies premises within the physical confines of the Bank's building (R. 4).

The protective force of the Bank consists of 35 armed guards, comprising three groups, namely, police guards, messenger guards and night watchmen. The duties of the police guards consist of guarding the premises and directing customers seeking information. The messenger guards are plain clothes men who accompany and protect messengers traveling from the Bank to other banks or business houses in the City of Chicago. The night watchmen protect the premises of the Bank at night. All the protection force is under the immediate supervision of the chief of the day police of the Bank (R. 4).

The Safe Deposit Company employs three armed guards and five vault attendants, deputized to carry arms. Their duties consist of guarding the premises of the Safe Deposit Company, issuing, receiving and checking access slips from safe deposit box lessees and withdrawing and replacing

boxes for lessees. They are under the immediate supervision of the manager of the Safe Deposit Company (R. 5).

On March 26, 1943, Protective Service Employees' Union of Chicago, Local 240, affiliated with Building Service Employees' International Union (A. F. of L.), a labor organization (hereinafter called the "Union"), filed with the Regional Director of the Board for the Thirteenth Region (Chicago, Illinois) a petition alleging that a question affecting commerce had arisen concerning representation of certain of the employees of the Bank and of the Safe Deposit Company and requesting an investigation and certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act. This petition related to said 35 protection employees of the Bank and said eight armed guards and vault attendants of the Safe Deposit Company and described them as together constituting an appropriate bargaining unit (R. 5).

After a hearing at which the Bank and Safe Deposit Company offered evidence in opposition to the petition, the Board made a decision and direction of election in which it found that the Bank and Safe Deposit Company might be considered as a single integrated enterprise, that they were engaged in commerce, that their operations affected commerce within the meaning of the National Labor Relations Act, and that said protective force of the Bank and said armed guards and vault attendants of the Safe Deposit Company constituted a proper bargaining unit. The decision and direction ordered that an election be held among said employees of the two companies to ascertain their representative for the purpose of collective bargaining (R. 6-7).

On July 10, 1943, an election was held among said employees. The Regional Director of the Board thereafter certified that 23 unchallenged ballots were cast in favor of,

and 17 against, the Union. Objections were filed by the Bank and Safe Deposit Company to the conduct of the election, to the jurisdiction of the Board and to the appropriateness of the unit. Said objections were overruled and the Board, by a supplemental decision and certification of representatives, certified that the Union had been designated and selected by a majority of all the members of the protection force employed by the Bank and of the armed guards and vault attendants employed by the Safe Deposit Company as their exclusive representative for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment (R. 7-8).

Thirty-five of the Bank's protection force voted at said election, 15 in favor of, and 20 against, the Union. But for the inclusion in the unit of the 8 employees of the Safe Deposit Company a majority of the votes cast would have been against the Union. At the time of said election and at the present time, it is the desire of a majority of the protection employees of the Bank that they not be represented by the Union for the purpose of collective bargaining. None of the plaintiffs (petitioners) was a party to or had any notice of or opportunity to be heard in said proceedings before the Board (R. 9).

The complaint further alleges that petitioners severally have a right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment, which right is a property right of great value, and that they have a right to select representatives for the purpose of collective bargaining, etc., and that said right is also a property right of great value (R. 9).

The complaint charges that the said decision and direction of election and supplemental decision and certification

of representatives are beyond the power of the Board and in contravention of the Act and of the Fifth Amendment to the Constitution of the United States and are invalid, null and void in that neither the Bank nor the Safe Deposit Company is engaged in commerce or in any activity affecting commerce, but each is engaged in purely local and intrastate activity limited to the territory and confines of the City of Chicago and that no business of either corporation has any direct, immediate, close or substantial effect upon interstate commerce; that the protection force of the Bank is not engaged in commerce or in any activity affecting commerce, but is engaged solely in protecting the physical premises and contents thereof belonging to the Bank in Chicago and the customers and employees making use of and going to and from said premises, and that no part of their activity extends beyond the confines of the City of Chicago or affects interstate commerce in any direct, immediate, close or substantial manner; that the armed guards and vault attendants of the Safe Deposit Company are not engaged in commerce or in activities affecting commerce; that their activity is confined to the premises of the Safe Deposit Company in Chicago and that they are engaged solely in protecting said premises and in making available to customers the deposit boxes maintained in the vault of the Safe Deposit Company in Chicago (R. 9-10).

The complaint further charges that said decision and direction of election and supplemental decision and certification of representatives are erroneous and invalid for the further reasons that the findings of the Board namely: (1) that the Bank and Safe Deposit Company may be considered as a single integrated enterprise and that they are engaged in commerce and their operations affect commerce within the meaning of the Act, (2) that a question affecting commerce has arisen concerning the representa-

tion of the employees within the meaning of the Act, and (3), that all the members of the protective force of the Bank and the armed guards and vault attendants of the Safe Deposit Company constitute a unit for the purpose of collective bargaining, are unsupported by evidence and contrary to the evidence (R. 11).

It is further charged that the decision of the Board that the employees of the Safe Deposit Company should be joined in a collective bargaining unit with the protection employees of the Bank was and is arbitrary and capricious (R. 11).

It is further charged that unless said decision and direction of election and said supplemental decision and certification of representatives are declared null and void or vacated and set aside the petitioners will be unlawfully deprived of their right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and of their right to select representatives for the purpose of collective bargaining with respect to said subjects; that the value of such rights cannot be measured by any certain pecuniary standard and that an action at law for damages resulting to petitioners because of the unlawful taking and destruction of said rights would be inappropriate and wholly inadequate (R. 11-12).

It is also alleged that the Act contains no provision by which the petitioners may obtain a review of said decision and direction of election or said supplemental decision and certification of representatives and that petitioners have no way of preventing the aforesaid unlawful taking of their property rights or of obtaining redress therefor except in a court of equity (R. 12).

The complaint prays that said decision and direction of election and said supplemental decision and certification of representatives be declared null and void and that a

mandatory injunction be granted restraining and enjoining the defendants from permitting said decision and direction of election and said supplemental decision and certification of representatives to remain upon the records of the Board, and directing the defendants to vacate, set aside and expunge the same from the records of the Board (R. 12-13).

The petitioners filed a motion for a preliminary injunction (R. 28) and two supporting affidavits. From these affidavits it appears that the Bank had declined to bargain with the Union and that the United States Conciliation Service had certified the dispute between the Bank and the Union to the National War Labor Board (R. 34-36).

The District Court denied the motion for a preliminary injunction and sustained a motion of the defendants to dismiss the complaint.

The District Court held that it had jurisdiction to grant the relief sought by the petitioners, but stated that the record disclosed that the Board had sufficient evidence to warrant including the employees of the Bank and Safe Deposit Company in one unit and to warrant its holding that the Bank was engaged in commerce (R. 39-40). Since neither the evidence introduced before the Board nor any other evidence was before the District Court, the holding of the court can only be taken to mean that on the allegations of the complaint the action of the Board was justified. However, the complaint specifically alleges that the findings of the Board, (1) that the employees of the Bank and Safe Deposit Company constitute a unit for the purpose of collective bargaining, and (2) that the Bank and the Safe Deposit Company are engaged in commerce, are unsupported by evidence and contrary to the evidence. Under well recognized rules of pleadings these allegations of the complaint are allegations of fact admitted to be true for the purpose of a motion to dismiss the complaint (*Chicago Junction*

Case, 264 U. S. 258, 262). The action of the District Court dismissing the complaint on the merits was therefore wholly unjustified and violated elementary principles of the law of pleading.

The Court of Appeals, on the contrary, did not purport to pass upon the validity of the Board's action. It held that the National Labor Relations Act did not provide for a review of a certification of representatives by the Board, unless such certification was followed by an order of the Board. It further held that the petitioners had made no showing of any special circumstances which made the review provided by the act an inadequate remedy for the matters set out in the complaint, and affirmed the judgment of the District Court dismissing the complaint. The judgment of the Court of Appeals is based upon the assumption that the petitioners are afforded a remedy under the Act, whereas the Act affords absolutely no remedy for employees in the position of petitioners. The effect of the judgment of the Court of Appeals is to deny to petitioners any relief from action of the Board alleged to be arbitrary and capricious and in excess of the Board's jurisdiction and in violation of their fundamental rights protected by constitutional guaranties.

Your petitioners now seek a review and reversal of that judgment by this Honorable Court.

Questions Presented

The fundamental question presented by this petition is, will the courts of the United States protect the basic rights of citizens from the arbitrary, unauthorized and unconstitutional action of an administrative board?

Preliminary to this fundamental question are the following questions:

1. Does the complaint allege facts which, if proven, will establish that either the protective force of the Bank, the

vault attendants of the Safe Deposit Company or the Safe Deposit Company are not engaged in commerce or operations that affect commerce within the meaning of the National Labor Relations Act?

2. Does the complaint allege facts which, if proven, will establish that the Board acted arbitrarily and capriciously, or without any support in the evidence, in holding that the protective force of the Bank and the vault attendants of the Safe Deposit Company constitute an appropriate unit for the purposes of collective bargaining?

3. Does the certification of the bargaining representative by the Board deprive or threaten to deprive the petitioners of their right to bargain with their employer with respect to rates of pay, wages, hours of employment and other conditions of employment and of their right to select representatives for the purpose of collective bargaining with respect to said subjects?

4. Are such bargaining rights of the petitioners protected by the Constitution of the United States and particularly by the Fifth Amendment thereto?

5. Are the petitioners afforded any remedy under the National Labor Relations Act from the deprivation or threatened deprivation of those rights resulting from the certification of a bargaining representative by the Board?

If, of the preliminary questions, either 1 or 2, together with 3 and 4 are answered in the affirmative and 5 in the negative, then this petition presents the all-important question of whether the courts of the United States are to continue to perform one of their great historic functions, namely, the protection of the rights of citizens guaranteed

by the Constitution from arbitrary, unauthorized and unconstitutional administrative action.

Reasons for Granting the Writ

1. *The decision below is contrary to the uniform line of decisions of this Court.*

This Court has uniformly held that the courts of the United States will exercise their jurisdiction to protect the constitutional rights of citizens when those rights are infringed or invaded by unauthorized governmental action. The Court of Appeals for the District of Columbia in affirming the judgment dismissing petitioners' complaint on the assumption that the petitioners are afforded a remedy by procedure authorized under the National Labor Relations Act, when no such remedy exists, has denied petitioners a resort to the courts of the United States for the protection of their constitutional rights.

2. *The decision below permits an administrative agency to enlarge its own jurisdiction contrary to limitations imposed by Congress.*

If either the protective force employees of the Bank, the vault attendants of the Safe Deposit Company or the Safe Deposit Company are not engaged in interstate commerce within the meaning of the act, the decisions and certification of the Board represents an attempted exercise of authority beyond the Board's jurisdiction which vitally affects petitioners. The decision below precludes any judicial review of the question of the Board's jurisdiction, leaves the Board to act in its own uncontrolled discretion, and makes it the final judge of its own jurisdiction, a power which Congress has not attempted to and could not lawfully confer upon the Board under the Constitution.

3. *The question of the right of courts of the United States to review by an independent suit in equity the validity of a certification of a bargaining representative by the Natioinal Labor Relatons Board has not been, but should be, settled by this Court.*

In *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, the Court in referring to this question said (p. 412):

> "* * * It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record."

A number of district courts have taken jurisdiction of similar actions involving representative proceedings of the Board. *American Federation of Labor, et al.* v. *Madden, et al.* (U. S. D. C., D. C., 1940), 33 F. Supp. 943; *International Brotherhood of Electrical Workers, et al.* v. *N. L. R. B.* (D. C., Mich., 1940), 41 Supp. 57; *Klein* v. *Herrick* (D. C., S. D. N. Y., 1941), 41 F. Supp. 417. In *Inland Empire District Council, Lumber and Saw Mill Workers' Union, et al.* v. *Thomas P. Graham, Jr., et al.* (U. S. D. C., W. D. Wash., 1943), 53 F. Supp. 369, the court expressed the opinion it would have jurisdiction in a proper suit, although it dismissed the action as premature.

The frequent recurrence of this important question indicates a definite need for its final decision by this Court.

Prayer

Wherefore petitioners pray for a Writ of Certiorari to issue from this Honorable Court reviewing the judgment of the United States Court of Appeals for the District of

Columbia entered in this cause on July 10, 1944, to the end that the judgment of that court be reversed by this Honorable Court and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem lawful and just.

Respectfully submitted,

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